



Interviews with offshore authorities: A webinar series on U.S. offshore wind regulatory issues

Jones Act Compliance and U.S. Offshore Wind Projects

March 7, 2019

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Third Topic Thursday, March 21, 2019

Bureau of Safety and Environmental Enforcement (BSEE) and Bureau of Ocean Energy Management (BOEM) Oversight of Offshore Wind Projects

IPF Afternoon Pre-Conference Monday, April 8, 2019

Jones Act Compliance and U.S. Offshore Wind Projects

March 7, 2019
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Agenda

1. Basic Understanding of the Jones Act
 - Related Laws
 - Parsing the Statute
 - Where it Applies
 - Exceptions
 - Penalties
 - Waivers
2. Application of the Jones Act to Renewable Energy in General
3. Jones Act and Offshore Wind

1. Basics – History



Sen. Wesley L. Jones

- Jones Act traces its origins to the third Act of the first U.S. Congress in 1789.
 - Imposed 50 cents per ton duty on foreign vessels versus 6 cents per ton on U.S. vessels.
 - Direct predecessor is an 1817 navigation act with the first outright prohibition of foreign vessels in U.S. domestic trade.
- Current Jones Act is section 27 of the Merchant Marine Act, 1920 credited to Sen. Wesley L. Jones from Washington State.
 - Not to be confused with section 33 relating to maritime workman's comp. also called the "Jones Act."

1. Basics – Text

“a vessel may not provide **any part** of the transportation of **merchandise** by water, or by land and water, between **points in the United States** to which the coastwise laws apply, either directly or via a foreign port, unless the vessel . . . [is a qualified US-flag vessel]”

- Law is mainly interpreted by U.S. Customs and Border Protection or CBP.
- CBP rulings publicly available at <https://rulings.cbp.gov>.



1. Basics – Other Laws



- Several other statutes are similar to the Jones Act and have to be considered with respect to offshore activity:
 - **Passenger Vessel Services Act of 1886**
 - Covers the carriage of "passengers" between U.S. points
 - **Act of June 11, 1940 (the Towing Statute)**
 - Covers towing and vessel escorting in U.S. waters
 - **Dredging Act of 1906**
 - Restricts dredging in U.S. waters to qualified U.S.-flag dredges

1. Basics – Qualified U.S.-Flag Vessel

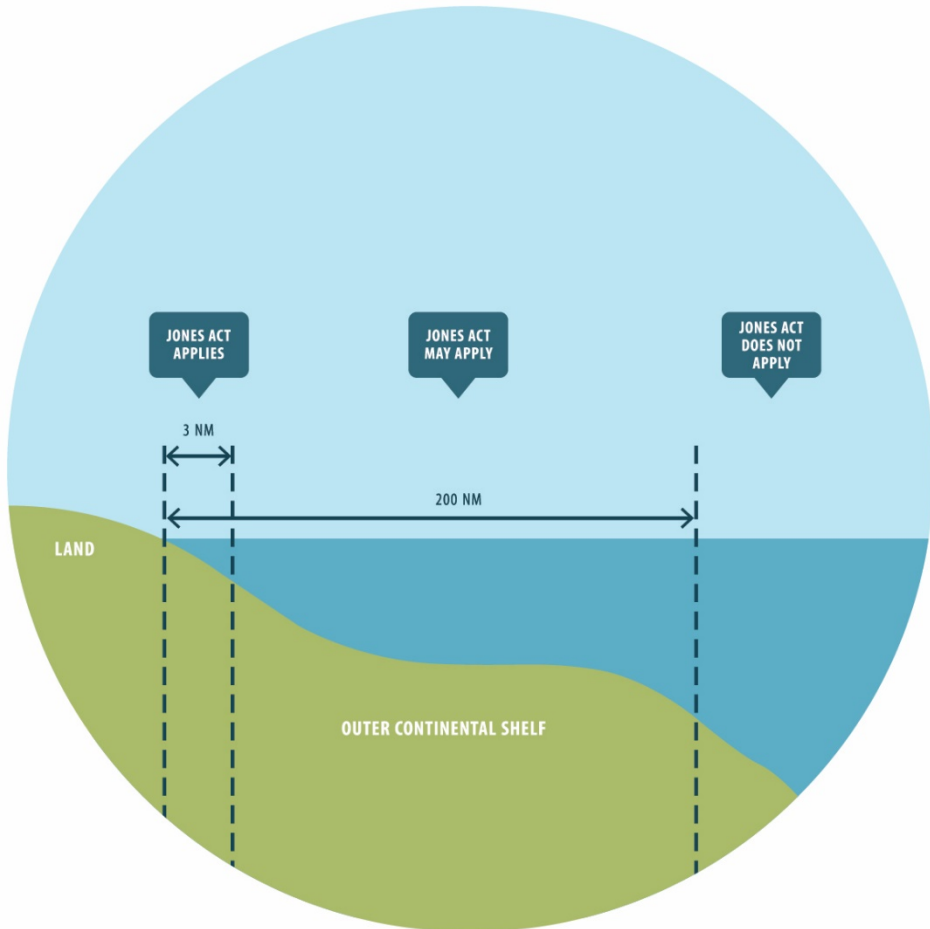


- “Built in the United States”
 - “Major components of its hull and superstructure are fabricated” in the U.S.
 - “Vessel is assembled entirely in the U.S.”
- Owned and operated by a qualified U.S. citizen
 - Organized in the United States
 - Largely U.S. citizen management
 - 75 percent owned by U.S. citizens
 - Overall vessel control must be in U.S. citizen hands of U.S. citizens
- Registered with the U.S. Coast Guard as a U.S.-flag vessel
 - Which means that the crew must be U.S. citizens with a limited number of U.S. permanent residents

1. Basics – “Points in the United States”

- Every place within U.S. physical territory is a “point in the United States.”
 - So, all U.S. ports are “points in the United States.”
- Physical territory includes the “territorial sea” which is every place within three nautical miles of the U.S. coast for purposes of the Jones Act.
 - That same zone is sometimes referred to as “state waters” because the economic aspects, like leasing, out to 3 NM is reserved to the adjacent states.
 - To confuse matters, the state waters of Texas and Florida (on the Gulf Coast side) extend out 9 NM.
 - The “territorial sea” is 12 NM for certain other purposes such as federal law enforcement.

1. Basics – “Points in the United States”



- Outside the 3NM, a place becomes a “point” by virtue of the Outer Continental Shelf Lands Act or OCSLA.
- OCSLA extended the Jones Act to “points” on the U.S. outer continental shelf for “resource” related exploration, development and production.
- Specifically, “to all artificial islands, and all installations and other devices, **permanently or temporarily attached to the seabed.**”

1. Basics – “Merchandise”

- "Merchandise" generally encompasses anything a vessel carries unless there is an exception.
- Exceptions include –
 - Empty containers and barges
 - Stevedoring equipment
 - “Stores”
 - “Vessel equipment”
- In defining “vessel equipment,” CBP focused in the past on a vessel’s function and whether the “equipment” was necessary to that function – not necessarily whether necessary for navigation or vessel safety.
- Found to be “vessel equipment” if delivered by the installation vessel –
 - Pipeline connectors
 - Risers
 - Cement

1. Basics – “Merchandise”



- CBP in 2009 confirmed that a subsea assembly was "vessel equipment" of an installation vessel.
- This became hugely controversial.
- Later CBP withdrew the ruling and attempted a regulatory process thereby throwing whole area into uncertainty.

1. Basics – “Merchandise”



- Just before the Obama Administration left in January 2017, CBP proposed that the “vessel equipment” exception be narrowed and that prior rulings be rescinded.
- This led to huge opposition from the oil and gas industry and a law suit against the U.S. Government.
- Again, the notice was withdrawn, but the suit and negotiations are ongoing leaving prior rulings in limbo.

1. Basics – “Any Part”



- No voyage between two “points in the United States” is too short.
- For example –
 - Dynamically positioned foreign vessel to transfer with its crane and install a topside on a SPAR.
 - Topside delivered to vessel by JA-qualified barge.
 - Foreign vessel to move under its own propulsion to position itself to use its crane to install topside.
 - CBP found this to be a Jones Act violation despite *de minimis* movement of the barge and despite the movement of barge being a tiny part of the overall transportation of the topside.

1. Basics – Exemptions

- Jones Act has express and implicit/recognized exemptions for foreign vessels.
- Express exemptions include –
 - “Merchandise” exceptions such as for empty containers
 - Oil spill response when U.S.-flag vessels insufficient
 - When merchandise moves in part over Canadian rail lines
- Implicit exemptions include –
 - Construction and installation activities where there is no transportation of merchandise
 - Oil drilling and similar activities – think *Deepwater Horizon*
 - Pipe and cable laying
 - Oceanographic/research/seismic activities
 - “Voyages to no-where” – particularly important for gambling vessels
 - Ice breaking

1. Basics – Penalties



- Penalties for violation of the Jones Act can be harsh.
 - Merchandise transported in violation may be seized and forfeited.
 - Fine amounting to the greater of the cost of the offending transportation or the value of the merchandise can be assessed.
 - Additional penalties where the vessel documentation laws are violated are possible.
- Probably the largest ever fine of \$10 million was paid in 2017 in the case where a jack up rig was transported from the U.S. Gulf of Mexico to Cook Inlet in Alaska on a non-U.S.-flag vessel.

1. Basics – Waivers



- Waivers can be granted by Act of Congress or by the U.S. Department of Homeland Security.
- Legislated waivers are fairly common.
 - *E.g.* America's Cup Act in November 2011
 - Often appear in periodic Coast Guard authorization acts

1. Basics – Waivers

- Administrative waivers absent extraordinary circumstances are rare.
 - Must be a finding that it is in the interest of national defense.
 - Period waivers after each of Hurricanes Rita, Katrina and Sandy.
 - Commercial expediency is insufficient.
 - US Maritime Administration must find no US capacity for a waiver to issue.



2. Renewable Energy – Does the JA Apply?

- OCSLA applies the Jones Act –
 - "to all artificial islands, and all installations and other devices, permanently or temporarily attached to the seabed, which may be erected thereon **for the purpose of exploring for, developing, or producing resources**" from the US OCS
- Legislative history and related laws indicates that “resources” is limited to oil, gas and mineral resources recovered from the seabed or submerged lands on the OCS."

2. Renewable Energy – Does the JA Apply?

- No public CBP guidance is available.
- U.S. Congress would have fixed the issue in 2010 in *Deepwater Horizon* legislation which did not become law.
- However, the working assumption is to apply the Jones Act since it could be changed by the U.S. Congress after a project commences.

3. JA & Offshore Wind – “Points”

- When does a work site become a “U.S. point”?
 - Working assumption is that once a pile is driven, it becomes a U.S. point.
 - Although there are rulings that say that a “point” must be a place where merchandise or passengers can be “unladen.”
- Is a wind farm as a whole a “point” or is each tower a “point”?
 - Precedents indicate each tower is a “point.”
 - This issue has been the subject of ongoing discussions between the U.S. oil and gas community and the offshore Jones Act community.
- The extent of the point has particular relevance for the installation of scour protection – is the delivery of rocks **around** the foundation delivery to a “point”?

3. JA & Offshore Wind – Installation



- Judging by oil and gas rulings, the act of installing a tower is not in and of itself a Jones Act movement.
 - Theory is that installation does not involve the transportation of "merchandise" between points.
- CBP has ruled similarly with wind towers in May 2010 and February 2011.
- Thus, installation vessel that does not go back and forth to a U.S. port but is fed as necessary by a JA qualified barge can be non-U.S. flag.
 - This is the model used to install the towers at Block Island, Rhode Island on the U.S. east coast.

3. JA & Offshore Wind – Installation

- Once the installation vessel is “attached,” *i.e.* anchored in some way to the seabed, then it is likely a point in the United States.
- Once it becomes a “point,” all “merchandise” and “passengers” delivered from a U.S. port to that jack up or anchored vessel must go in a Jones Act-qualified vessel.
 - With “merchandise” – it is not clear the continued viability of the “vessel equipment” exception and how it might apply to installation tools and other items unloaded and loaded repeatedly during construction.

3. JA & Offshore Wind – Installation/Crew

- Passenger Vessel Services Act applies where Jones Act applies.
 - One notable difference is that penalties are not as significant.
- Therefore, JA qualified vessels are generally required to bring “passengers” from a U.S. port to a U.S. “point.”
 - But not all people are “passengers” – passenger is someone “not connected with the operation of such vessel, her navigation, ownership, or business.”
 - Therefore, installation crew vs. marine crew may be persons other than “passengers.”

3. JA & Offshore Wind – Component Transportation

NG series jack-up vessels
Type NG-3750C-FEEDER



- JA-qualified vessels are generally required to bring components from a U.S. port to a U.S. “point.”
- Components that come directly from a foreign port can be brought via foreign vessel.
 - But once a component is brought from a foreign country and landed at a U.S. port – it is generally treated as if it originated from the U.S. regardless of how long it was landed.
 - Similarly, the transportation of components from the U.S. which are landed for a time in a foreign country and then returned to the U.S. is generally a JA voyage unless the component is turned into something “new and different” on shore in the foreign country.

3. JA & Offshore Wind – Cable Laying

- The general rule is that a foreign-flag vessel may lay cable or pipe in U.S. waters – from any point on the U.S. coast to any offshore U.S. point.
 - Theory is that the paying out of cable or pipe is not the “unlading” of “merchandise.”
- “Dredging” within the three nautical mile limit of the U.S. coastline must be done by a qualified U.S.-flag vessel.
 - “Dredging” has been interpreted to mean the use of a mechanical plow or other excavating machinery.
 - Fluidization is not generally considered “dredging.”
 - Unclear, how much “trenching” is permitted by foreign vessels.
 - Jones Act restriction on the use of a foreign flag vessel to dredge applies outside the 3 NM limit if the “exploring, developing and producing resources” test is met.

3. Offshore Wind Farms – Cable Laying

- Outside three mile limit, consideration must be given to the requirement to use U.S.-flag vessels for the carriage of dredged material anywhere in the U.S. exclusive economic zone.
- For cable repairs, a qualified U.S.-flag vessel is necessary to transport cable it picks up from the seabed within the 3 nm and brought to shore – every place within the 3 nm is considered a U.S. “point.”
- Cable brought to a work site from abroad and placed aboard an anchored cable laying vessel, could be accomplished with a foreign-flag vessel because this is not transportation between two U.S. “points” even if the anchored vessel is in U.S. waters.

Conclusion

Questions?